No. 83-1407

In The
Supreme Court of the United States
October Term, 1983

JOHN LANGUIRAND,

Petitioner,

vs.

CITY OF PASS CHRISTIAN,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE

A.

Since there was no policy or custom adopted by the city connecting the accidental shooting there can be no liability of the city under § 1983.

Policy or Custom

(1) The Fifth Circuit's Opinion reflects an exhaustive examination of the trial record, searching and sifting

for shards or fragments of evidence which might furnish a basis for a factual determination that Petitioner's accidental injury was a result of policy or custom adopted by the City. Finding none, it reversed and rendered.

The essence of the Fifth Circuit's Opinion, we believe is as follows:

> (App. P.26—Opinion) *Supra,*
>
> What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grevious and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983.

Petitioner misread the Fifth Circuit Opinion to require the Plaintiff to prove the entire police force was inadequately trained. What the Panel Decision held was that even if Hayden and the chief of police were grossly negligent, there was no nexus between the negligence and policy or custom. The foundation for the 1983 cause of action against the City is a policy or custom. To hold the City liable without that nexus is to impose liability based upon *respondeat superior,* which cannot be done. *Monell v. Department of Social Services of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

Ultra Vires

(2) At Pages 6 and 7 of the Petition, Petitioner addresses the subject of the Pass Christian Civil Service Commission in the context of policy or custom. This is a

totally new subject never even hinted at in the lower courts. The Civil Service Commission simply tested Hayden along with other applicants and certified to the appointing authority that he was eligible for employment. The Commission did not "hire" Hayden. Section 21-31-1 *et seq.*, MISS CODE ANN. (1972).

Smith v. Wade

(3) Petitioner seems to argue that *Smith v. Wade*[1] diminishes the Plaintiff's burden of proof in 1983 cases. The citation from *Smith*, at Page 8 of the Petition, is in the context of punitive damages. *Smith* does not change *Monell's* prohibition of recovery on the theory of *respondeat superior*. It simply holds that "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifferernce to the federally protected rights of others . . ." punitive damages may be awarded in a 1983 case.

B.

There is no conflict in the circuits.

While the Panel's decision held that the decisions from the other Circuits were not "harmonious", it did not expressly find a conflict among the Circuits, nor did it decline to align the Fifth Circuit with any other Circuits. A careful reading of the cases from other Circuits cited and discussed by the Fifth Circuit, at Pages 19 to 21 of the appendix, reveals that in all but one of the cited cases, the courts were dealing with dismissal on the pleadings or on summary judgments rendered for defendants or errors in instructions.

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[1] — U.S. —, — S.Ct. —, 75 L.Ed. 2d 632 (April 20, 1983)

1. *McClelland v. Facteau,* 610 F.2d 693 (10th 1979), Summary Judgment was granted to two police chiefs who (1) did not participate in the alleged deprivation of Plaintiff's constitutional rights and, (2) as to Plaintiff's contention that the chiefs did not properly supervise their subordinates. On appeal, Summary Judgment was affirmed as to the first contention and reversed as to the second, because there were genuine issues raised below when Plaintiff introduced newspaper articles and affidavits indicating that it was a well known fact that rights were being violated. The Court said "distant rumors that are too vague to prompt action by reasonable persons, or information that is reasonably believed to lack credibility do not provide sufficient notice." (Citation omitted). However, Plaintiff's showing was adequate to survive Summary Judgment, and on that issue the case was remanded.

2. In *Owens v. Haas,* 601 F.2d 1242 (2nd 1979), *cert. denied,* 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed. 2d 407 (1979), Owens' 1983 Complaint was dismissed on the pleadings. Reversing, the Court held "Owens should have been allowed limited discovery and opportunity to amend his complaint to plead facts to support a legitimate § 1983 claim . . ." *Supra* 1251.

3. *Hayes v. Jefferson County,* 668 F.2d 869 (6th 1982), *cert. denied,* — U.S. — 103 S.Ct. 75, 74 L.Ed. 2d 73 (1982), the Court of Appeals reversed a 1983 action because the Trial Court's instruction was based on simple negligence. The Court noted "the case law has limited § 1983 so as not to reach isolated instances where negligent failure to adequately supervise, train, or control was involved . . ." (Citation omitted).

4. *Popow v. City of Margate,* 476 F.Supp. 1237 (D.N.J. 1979), the District Court denied Summary Judgment to the City of Margate, (in a cause of action brought by the widow of an innocent bystander killed by a policeman pursuing a suspect). The District Court discussed facts and inferences which might establish a policy or custom without deciding the case on the merits, and without deciding whether the evidence established the necessary policy or custom.

5. In *Powe v. City of Chicago,* 664 F.2d 639 (7th 1981), Powe was robbed and his identification stolen. Afterwards, the police force records indicated that Andrew Powe should be detained if arrested. He was arrested improperly on four occasions. The District Court granted Summary Judgment for the City of Chicago and Cooke County. On appeal, the 9th Circuit held that Powe had alleged sufficient facts to raise an inference that the City's procedures were deficient to the extent that an innocent man was arrested on four occasions and remanded the case back to the District Court for trial.

6. *Monell* was decided on June 9, 1978. On December 21, 1978, Chief District Judge Pettine decided *Leite v. City of Providence,* 463 F.Supp. 585 (D.C.R.I. 1978) on the City's Motion to Dismiss the Complaint. The Court concluded that "Plaintiff in this case does not allege the requisite intentional conduct, or recklessness, or gross negligence necessary to state a claim against a municipality under section 1983", dismissed the Plaintiff's claim without prejudice and gave Plaintiff thirty days to amend his Complaint. *Leite* is another instance of judgment on the pleadings, not on the merits.

7. In the only case cited by the Fifth Circuit and discussed in this response that went to trial on the merits, *Herrera v. Valentine,* 653 F.2d 1220 (8th 1981), the Court of Appeals for the 8th Circuit used the "deliberate indifference" tests to conclude that a female native Indian, who suffered severe personal injuries at the hands of a policeman hired by the City of Gordon, Nebraska, was only one of many Indians who had similar complaints against the police department. A hearing concerning Indian complaints against the police developed nearly forty separate complaints of police misconduct, which were submitted to the Mayor of Gordon. The entire City Council was given a summary of the complaints, and the Plaintiff's participation was publicized in the local newspapers. No action was taken by the City Council, the Court said "[The City] permitted its overzealous police force to continue its overlording". *Supra,* 1225, and affirmed the award of damages made to her.

Languirand is clearly distinguishable from the facts in *Herrera.* Nothing remotely resembling the Indians' complaints in *Herrera* was directed to the City Council of Pass Christian. Neither the Fifth Circuit nor the Petitioner has demonstrated a split in the circuits. Petitioner contends that there is a conflict, but devotes two-thirds of his argument under that heading to *Smith v. Wade* and none to the conflict. We submit that Petitioner has failed to "present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding . . ."[2] of the alleged conflict among the circuits and for that reason alone, the petition should be denied.

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[2]Rules of Supreme Court of the U.S., 21.5

CONCLUSION

Respondent submits that the Fifth Circuit correctly applied *Monell*. Its decision is in accord with the circuits, and the § 1983 decisions of this Court.

RESPECTFULLY SUBMITTED this the 7th day of May, 1984.

CITY OF PASS CHRISTIAN

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